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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-17

JAMES M. SPROUSE, *Petitioner*

v.

CLAY COMMUNICATIONS, INC., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO CROSS-PETITION OF PETITIONER

This cross-petition for a writ of certiorari was filed by James M. Sprouse (hereafter "Sprouse"), petitioner herein and respondent in Docket No. 74-1384, seeking review of the judgment and opinion of the Supreme Court of Appeals of West Virginia entered on February 4, 1975, insofar as it reversed a $500,000 punitive damage award to Sprouse in the trial court. There is also pending in this Court Docket No. 74-1384, which is a petition for writ of certiorari filed by respondent herein, Clay Communications, Inc., (hereafter "Clay") seeking review of the issues decided adversely to it by the judgment and opinion of the Supreme Court of

Appeals. Also filed in Docket No. 74-1384 are a brief in opposition by Sprouse and a reply by Clay. To avoid unnecessary duplication and repetition, reference will be made in this brief in opposition to the documents filed by the parties in Docket No. 74-1384.[1]

OPINION BELOW

The complete opinion of the West Virginia Supreme Court of Appeals is reported at 211 S.E.2d 764, and it attached as Appendix A to the petition. The portion of the opinion of the court below dealing with punitive damages appears at pp. 28a and 29a of Appendix A to the petition and in Appendix A to the cross-petition.

QUESTION PRESENTED

Whether this Court should review a decision by a state appellate court in a libel action by an unsuccessful gubernatorial candidate setting aside a punitive award of $500,000, when such state court holds that the punitive damage award is excessive in that (1) the actual damage award of $250,000 is sufficient to dissuade others in like circumstances from committing similar acts in the future and (2) "an award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which it has been the object and purpose" of this Court to prevent.

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[1] For convenience of reference to documents filed in Docket No. 74-1384, the petition for a writ of certiorari filed in that case by Clay shall be referred to herein as the "petition"; the brief in opposition filed in that case by Sprouse shall be referred to as "Sprouse brief in opposition"; and the reply to the Sprouse brief in opposition shall be referred to herein as the "Clay reply." The cross-petition filed in this Docket No. 75-17 by Sprouse shall be referred to herein as "cross-petition."

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions (Amendment I and Amendment XIV) are set forth in the cross-petition at page 3.

STATEMENT OF THE CASE

The statement of the case in the cross-petition, appearing at pages 3 through 11, is identical to the statement of the case in the Sprouse brief in opposition, except for the second full paragraph on page 4 and the last paragraph on page 11, and contains assertions which are either (a) not supported by the record or (b) involve an issue on which evidence was conflicting and which was resolved in favor of Clay by the Supreme Court of Appeals of West Virginia. Some of the patently false or misleading assertions made by Sprouse in his brief in opposition, and repeated in the cross-petition, are pointed out in the Clay reply, pages 1 through 4, which together with the statement of the case in the petition in Docket No. 74-1384 are incorporated herein by reference.

ARGUMENT

The opinion of the West Virginia Supreme Court of Appeals, insofar as it reversed the verdict and judgment of $500,000 punitive damages, is clearly correct, both under State and Federal law, and such reversal does not warrant review by this Court.

The court below held that the aggregate award of $750,000 in compensatory and punitive damages was excessive (Appendix A to the petition, pp. 28a and 29a) in that the $250,000 compensatory award was sufficient to punish Clay and to dissuade others from committing similar acts and the additional $500,000

punitive award would have a "chilling effect" upon First Amendment rights and would lead to self-censorship.

The decision below is consistent with West Virginia law regarding punitive damages. In *Spencer* v. *Steinbrecker,* 152 W. Va. 490, 164 S.E.2d 710 (1968), which was not a First Amendment case, it was held that an instruction on punitive damages should read as follows:

> "Punitive or exemplary damages are damages which together with and in reasonable proportion to the amount of compensatory damages will punish the defendant and in the judgment of the jury be sufficient to deter others from engaging in like course of conduct."

Sprouse Instruction No. 10A (cross-petition App. B, pp. 3a, 4a) as given by the trial court conforms to the holdings in *Spencer* v. *Steinbrecker, supra,* and instructed the jury that it could return a verdict for punitive damages only if its compensatory award was not adequate to punish the defendant and to deter others. Although the opinion of the court below is couched in First Amendment language, the standard applied would be applicable in West Virginia even in a non First Amendment context.

This Court has most recently recognized the danger inherent to First Amendment freedoms resulting from "uncontrolled discretion of juries to award damages" in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974). See also the dissenting opinion of Justice Marshall, in which Justice Stewart joined, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971) and Justice Harlan's dissenting opinion in that case. The cross-petition's

reliance upon the plurality opinion of Justice Harlan in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), will not stand scrutiny. In *Butts, supra,* at page 160, Mr. Justice Harlan stated:

> "We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted."

In *Butts* this Court was clearly citing with approval the action of the trial court in reducing the punitive award granted by the jury to Mr. Butts from $3,000,000 to $400,000.[2] The court below exercised that very type of judicial control which this Court approved in *Butts.* In this case the net worth of Clay was $3,500,000 and the trial court so instructed the jury.[3] The compensatory award of $250,000 and the punitive award of $500,000 aggregated more than 21% of the net worth of Clay.

Sprouse heavily predicates his argument upon the relative sizes of the total compensatory and punitive awards in *Butts* and in this instant case. The record in *Butts* reflects an award of $60,000 in compensatory damages and $400,000 in punitive damages. Sprouse immediately compares that total award of $460,000 with the total jury award in this case of $750,000 and reasons that they are approximately the same because of the inflation which has taken place between the early 1960's and the present date. Therefore, Sprouse con-

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[2] 255 F.Supp. 916 (1964).

[3] R. 719.

cludes that the amount of the jury award in this case is supported by the award of $460,000 in *Butts*. This argument is fallacious in the extreme. The trial court in *Butts* ordered a remittitur from the $3,000,000 jury punitive damage award to $400,000. This remittitur was upheld by the United States Court of Appeals for the 5th Circuit[4] as a proper exercise of discretion. There the Court of Appeals stated, at page 718, that the trial judge had a duty to determine whether as a matter of law the verdict comports with law. In addition, while Clay had a net worth of 3.5 million dollars, Curtis Publishing Company had a net worth as of December 31, 1962, of $27,932,000.[5] Sprouse totally overlooks the net worth of Curtis Publishing Company in arguing that the reduced award in *Butts* supports the amount of the jury award in the instant case. In fact, the contrary is true and *Butts* fully supports the judicial control exercised by the court below in finding as a matter of law that Clay's First Amendment rights would be seriously jeopardized by the excessive jury award of $750,000. The $250,000 award left standing by the court below is actually a substantially greater proportion of Clay's net worth than the $460,000 award was to the net worth of Curtis Publishing Company.

CONCLUSION

Although the action of the court below in reversing the punitive damage award of $500,000 was patently correct and does not require review by this Court, nothing herein should be construed as a retreat by Clay Communications, Inc. from the position taken by

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[4] 351 F.2d 702 (1965).

[5] Moody's Industrial Manual—American & Foreign, 1963 Ed., P. 1273.

it in its Petition (Docket No. 74-1384) requesting review and reversal of the judgment below as violative of its First Amendment guarantee of a free press. Accordingly, it is respectfully urged that the instant cross-petition be denied and again respectfully urged that the petition of Clay Communications, Inc. in Docket No. 74-1384 be granted.

Respectfully submitted,

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